Petition

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No. 81-191

In the
Supreme Court of the United States

ANNE NEEDHAM,

Plaintiff-Petitioner,

vs.

WHITE LABORATORIES, INC.,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ANNE NEEDHAM,	)
	)
Plaintiff-Petitioner,	)
	)
-Vs-	)
	)
WHITE LABORATORIES, INC.,	)
	)
Defendant-Respondent.	)

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QUESTIONS PRESENTED

1. Whether the majority in the Seventh Circuit's opinion correctly determined that defendant's notice of appeal, filed ninety-nine (99) days subsequent to the order denying its post-trial motion met the strict mandatory time requirements of Rule 4(a)(4) of the Federal Rules of Appellate Procedure; and if so,

2. What is the criteria for the acceptance of such a late filing in view of the hopeless confusion arising from the instant decision which seems contrary to all current precedent, including this Court's

opinions in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962); Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964); and Wolfsohn v. Hankin, 321 F.2d 393 (D.C. Cir. 1963), rev'd, 376 U.S. 203 (1964)?

APPLICABLE RULE IN QUESTION

The Court Rule involved in this petition is Rule 4(a) of the Federal Rules of Appellate Procedure. It reads:

> Rule 4. Appeal as of Right - When Taken.
>
> (a) Appeals in civil cases.
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.
>
> (2) Except as provided in (a)(4) of

this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than thirty days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be

ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed thirty days past such prescribed time or ten days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

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PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS RENDERED IN THE ABOVE-ENTITLED CAUSE.

CITATIONS TO THE OPINIONS BELOW

The above-entitled case was originally brought in the United States District Court for the Northern District of Illinois. The District Court's memorandum opinion and order, dated January 10, 1980, denying defendant's post-trial motion was unreported. (App. A1). The District Court's memorandum opinion and order, dated March 19, 1980, denying defendant's motion to reconsider the post-trial motion was also unreported. The appeal from the judgment and the District Court's orders to the United States Court of Appeals for the Seventh Circuit is reported at 639 F.2d 394. Plaintiff's Petition for Rehearing en banc was denied on April 27, 1981, and was unreported. (App. A52). The Seventh Circuit's opinion is included in the Appendix to this Petition (App. A35).

JURISDICTIONAL STATEMENT

The divided (2-1) decision of the Circuit Court of Appeals was rendered in an opinion, reported at 639 F.2d 394, entered on January 27, 1981. A timely petition for rehearing en banc was filed and was denied by divided decision (three judges dissenting) on April 27, 1981. This Petition for Writ of Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF FACTS

The plaintiff, Anne Needham, brought this strict liability and negligence action against the defendant, White Laboratories. As a result of in utero exposure to Dienestrol, a product defendant White manufactured without adequate testing and warnings, plaintiff developed a rare form of cancer of the reproductive organs.

After a jury verdict in plaintiff's favor in the amount of $800,000.00, and judgment being entered thereon, defendant White filed a timely post-trial

motion pursuant to F. R. Civ. P. Rule 50(b). The motion was denied on January 14, 1980. Twenty-one days later, on February 4, 1980, defendant filed a motion for reconsideration of the January 14, 1980 order. The trial court denied the motion on March 20, 1980, some sixty-five (65) days subsequent to the January 14, 1980, order. Defendant filed its notice of appeal on April 21, 1980, some ninety-nine (99) days subsequent to the January 14, 1980, order.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This petition involves the hopeless confusion existing in the district courts as a result of the instant decision on the issue of just what reasons, if any, excuse a party from filing a timely notice of appeal under Rule 4(a). The decision below is not only in direct conflict with prior decisions in the Circuits and this Court, but also reflects an attitude towards the definitive determination of the finality of judgments which does violence to the rules, an

attitude which has heretofore been rejected by this Court. This issue requires comment by this Court.

II.

THE SEVENTH CIRCUIT ADOPTED TOTALLY NEW AND DIFFERENT CRITERIA IN EXCUSING DEFENDANT FROM FILING A TIMELY NOTICE OF APPEAL UNDER RULE 4(a). THE MAJORITY'S OPINION CONFLICTS WITH VIRTUALLY ALL PRECEDENT ON THE ISSUE AND CREATES HOPELESS CONFUSION IN THE DISTRICT AND CIRCUIT COURTS AS TO THE CERTAINTY WITH WHICH LITIGATION IS TO END.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure requires that notice of appeal be filed within thirty days from the date of judgment. Timely filing of a notice of appeal is mandatory and jurisdictional, United States v. Robinson, 361 U.S. 220 (1960), and cannot be extended by a reviewing Court. Fed. R. App. P. 26(b); Martinez v. Trainor, 556 F.2d 817 (7th Cir. 1977). Absent some act tolling or terminating the running of defendant's appeal, the time to appeal expires thirty days from the date of judgment.

Rule 4(a)(4) delineates four acts or motions which toll the time to appeal, if they are timely

filed: (1) a motion pursuant to Rule 50(b), Fed. R. Civ. P., for judgment notwithstanding the verdict; (2) a motion pursuant to Rule 52(b), Fed. R. Civ. P., to amend or make additional findings of fact; (3) a motion filed pursuant to Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment; or (4) a motion pursuant to Rule 59 to obtain a new trial. If any of these four types of post-trial motions is filed within ten days of entry of judgment, the thirty day limitation is tolled and begins to run anew from the order denying a new trial or granting or denying the other motions. Fed. R. App. P. 4(a).

On September 5, 1979, defendant filed a timely post-trial motion confined to alleged errors in the trial on liability. This motion was filed within ten days of the date judgment was rendered. This motion tolled the thirty day limitation until entry of the district court order denying or granting the motion. On January 10, 1980, the district court denied the post-trial motion (App. A33). Thus, the thirty day time period began to run anew, terminating on

February 13, 1980. On February 4, 1980, defendant filed a motion for reconsideration of the January 14, 1980, denial of defendant's post-trial motion.

A motion to reconsider an order denying a timely post-trial motion does not toll the thirty day limitation period that began to run when the first post-trial motion was denied. Wansor v. George Hantacho Co. Inc., 570 F.2d 1202, 1206 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979). As noted by Professor Moore, both the text and purpose of Rule 4(a)(4) indicate that it is an original motion of the type specified that postpones the appeal until after disposing of the motion. "The running of the time is not further extended by a motion to reconsider an order disposing of the motion." 9 Moore's Federal Practice §204.12[1]. Professor Moore explains that since all the motions that postpone the appeal time are motions which must be made within ten days after the entry of judgment, a motion to reconsider an order denying such a motion is not a motion under the rule. Thus, the

Seventh Circuit correctly held in this case that defendant's notice of appeal filed on April 21, 1980, ninety-ninedays after entry of the district court order denying defendant's timely post-trial motion, was untimely. Needham v. White Laboratories, 639 F.2d 394 (7th Cir. 1981).

However, the Seventh Circuit erroneously held that this case falls within the narrow exception recognized in Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) (per curiam) and heard the appeal. Even a cursory reading of Thompson and other precedent reveals that defendant's failure to file a timely notice of appeal does not come within the Thompson exception to the strict mandatory time requirements of Rule 4(a)(4).

The Thompson holding is the second of three decisions of this Court which appear to have carved out a narrow exception to the strict mandatory requirements of Rule 4(a)(4). The first in time is Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) (per curiam). In Harris, petitioner had, within the applicable period for filing appeal, received

from the trial court a thirty-day extension on the time for filing his appeal on the ground of "excusable neglect based on a failure of a party to learn of the entry of the judgment," pursuant to former Rule 73(a), now Fed. R. App. P. 4(a). Petitioner then filed his appeal within the period of the extension but beyond the original period for filing his appeal. The Court of Appeals, concluding that there had been no "excusable neglect" within Rule 73(a), held that the district court had erred in granting the extension and dismissed the appeal.

In reviewing Harris, this Court in a per curiam decision first noted that the district court properly entertained the motion to extend petitioner's time to file his appeal before the initial thirty days allowed for filing the appeal had elapsed. The Court then held:

> "In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the thirty-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals

ought not to have disturbed the motion judge's ruling." 371 U.S. 215, at 217.

This Court later commented on Harris in Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) (per curiam). In that case, petitioner's post-trial motions were not timely since they were served twelve days after the entry of judgment, two days beyond the time period within which such motions must be served in order to toll the running of the appeal period. The district court had taken the untimely motion for new trial under advisement, had declared that the motion was made "in ample time", and had subsequently denied the motion for a new trial after the time for filing an appeal from the initial decision had expired. The Court of Appeals dismissed the appeal as being untimely filed.

This Court in another per curiam decision concluded that this case fell within the letter and spirit of Harris. In comparing Harris with Thompson, this Court held:

"Here, as there, petitioner did an act which, if properly done, postponed the

> deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline . . . Accordingly, in view of these 'unique circumstances', . . ., we grant the writ of certiorari, vacate the judgment, and remand the case. . . ." 375 U.S. 384, 387.

Thus, this Court held that the "unique circumstances" necessary to validate an untimely appeal are: (1) the petitioner did an act which, if properly done, postponed the deadline for the filing of the appeal, and (2) the petitioner relied upon the statement of the district court that the motion was timely. See Motteler v. J.A. Jones Construction Co., 447 F.2d 954 (7th Cir. 1971).

This decision was reached by the Court despite a vigorous dissent by Justice Clark, with whom Justices Harlan, Stewart and White joined. Justice Clark disagreed with the majority's conclusion that the case fit the letter and spirit of Harris. He noted that in Harris the trial court had jurisdiction and properly entertained the motion to extend petitioner's time to file his appeal

before the initial thirty days allowed for filing the appeal had elapsed, "a far cry from this case where the trial court had no jurisdiction to pass upon the untimely motions to amend the findings and for a new trial." 375 U.S. 384, at 389. In criticizing the result reached by the Thompson majority, Justice Clark stated:

> "By thus authorizing the trial judge to entertain the motions it thereby extends the time for appeal . . . .
>
> . . . . Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by ad hoc relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischevious results, undermining the certainty of the rules and causing confusion among the lower courts and the bar. . . ." 375 U.S. 384, at 389-90.

The latest decision of this Court addressing this issue was Wolfsohn v. Hankin, 321 F.2d 393 (D.C. Cir. 1963), rev'd, 376 U.S. 203 (1964) (per curiam). In that case, the district court had entered an order

extending the time within which petitioner could move for rehearing under Rule 59. In reliance on this extension of time, the petitioner did not file his motion for rehearing within ten days and did not file his notice of appeal until after his motion for rehearing was denied, several months after the original judgment entry. This Court in another per curiam decision summarily reversed the court of appeals on the authority of the Harris and Thompson decisions.

Again, this decision was reached by the Court despite the dissent of Justice Clark, with whom Justices Harlan, Stewart, and White again joined. In concluding that the Harris decision should be confined to its peculiar facts, i.e., a finding of "excusable neglect", Justice Clark stated:

> "I say this, although I joined Harris, because the Court has used Harris to spawn the present hopeless confusion which I never contemplated at the time of its decision. . . It appears to me that through Harris this Court has given trial judges the de facto power to grant extensions of time, directly contra to the definite requirements of Rules 52(b) and 59 and the command of Rule 6(b)

> that the court 'may not extend the time for taking any action under rules . . . 52(b), 59(b), (d) and (e). . . .'" 376 U.S. 203, 203-04.

Given the division of this Court on the Harris-Thompson-Wolfsohn exception to the strict mandatory time requirements of Rule 4(a)(4), the Seventh Circuit in this case nonetheless extended the scope of the exception even beyond that contemplated by this Court so as to validate defendant's untimely appeal. The Thompson decision held that the "unique circumstances" necessary to validate an untimely appeal are: (1) the petitioner did an act which, if properly done, postponed the deadline for the filing of the appeal, and (2) the petitioner relied upon the statement of the district court that the motion was timely. 375 U.S. 384, at 387; Motteler v. J.A. Jones Construction Co., 447 F.2d 954 (7th Cir. 1971). Both the Harris and Wolfsohn decisions comply with the Thompson "unique circumstances" in that both cases involved: (1) the district court's assurance to the petitioner that his motion would toll the appeal

period, and (2) such motion, if it had been properly done, would have postponed the deadline for the filing of the appeal. The Seventh Circuit erred in applying the Thompson exception to this case because admittedly one of the "unique circumstances" required was not met in this case; that is, the defendant's untimely motion, if it had been properly done, would not have postponed the deadline for the filing of his appeal.

Defendant filed a timely post-trial motion confined to alleged errors in the trial on liability. This motion tolled the thirty day limitation until entry of the district order denying or granting the motion. On January 14, 1980, the district court denied the post-trial motion. Thus, the thirty day time period began to run anew, terminating on February 13, 1980. On February 4, 1980, defendant filed a motion for reconsideration of the January 14, 1980, denial of defendant's post-trial motion. Defendant filed its notice of appeal on April 21, 1980, ninety-nine days after entry of the district court order denying defendant's timely post-trial motion.

The majority correctly recognized that a motion to reconsider an order denying a post-trial motion does not toll the time for appeal which began running when the first post-trial motion was denied. Needham v. White Laboratories, 639 F.2d 394 (7th Cir. 1981); see also Wansor v. George Hantscho Co., Inc., 570 F.2d 1202, 1206 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979); 9 Moore's Federal Practice §204.12[1]. Thus, the majority implicitly recognized that one of the "unique circumstances" set forth in Thompson was not satisfied; that is, the defendant's motion to reconsider the denial of the post-trial motion could never postpone the deadline for filing of the appeal, even if properly done.*

The majority, however, relied on totally different factors to bring this case within the purview of the Thompson exception: plaintiff's trial counsel informed

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*The motion for reconsideration was not timely filed. a motion to reconsider must be filed within ten days of the entry of the order to which it is addressed. Fed. R. Civ. P. 59(e); Martin v. Wainwright, 469 F.2d 1072 (5th Cir. 1973). Since the motion was filed twenty-one days after the order, it was not timely.

the district court that the motion to reconsider was filed timely,* and the district court assured defendant that the motion to reconsider tolled the appeal time until it disposed of the motion. Because defendant relied on the trial court's assurances, the defendant was allowed to take his appeal. As dissenting Chief Justice Fairchild cogently noted, however, the appeal cannot be validated by Thompson because Thompson "predicated its holding not only on reliance on the district court's conclusion that a motion had been properly filed, but also upon appellant's performing 'an act which, if properly done, postponed the deadline for filing this appeal'." 639 F.2d 394, at 404. The motion for reconsideration filed by defendant was not an act which, if properly done, i.e., timely filed, would toll the time period for filing this appeal. Thus, the dissenting Chief Justice correctly determined that this

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*Plaintiff's characterization of the motion as timely has no legal significance. It has been held that "[i]t is quite clear that counsel cannot waive the strict [time] requirements of the rule." Hulson v. The Atchinson, Topeka and Santa Fe Railway Co., 289 F.2d 726, 730 (7th Cir. 1961).

case cannot fall within the Thompson exception.

This Court recently has expressed a policy favoring the strict application of Fed. R. App. P. 4(a) and the time limits of Fed. R. Civ. P. 52 and 59(e). Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978). In Browder, this Court strictly construed the time limits of Rule 4(a) and held that an untimely motion to reconsider, expressly considered by the district court and subsequently denied, will not toll the running of the mandatory and jurisdictional time limit. Rather than expressing a liberal view of the time requirement, and focusing on the petitioner's reliance on the district court's consideration of the motion during the time for appeal, this Court stated:

> "The purpose of the rule is clear: it is to set a definite time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose. Matton v. Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943)" Browder v. Director of Department of Corrections of

Illinois, 434 U.S. 257, at 264 (1978).

See also Federal Trade Commission v. Minneapolis Honeywell R.R. Co., 344 U.S. 206 (1952).

In Federal Trade Commission, this Court rejected the FTC's attempt to appeal from a second judgment which added nothing substantively different from the first judgment. Applying this reasoning to the case here, this Court should reject the notion that a second post-trial motion merely seeking reconsideration of an order denying an earlier post-trial motion, such as the one at bar, which essentially reasserts the same grounds for reversal, would toll the time for appeal. This Court has expressly rejected an interpretation of the rule which would lead to uncertain policies about the finality of judgments:

> * * * [W]e do mean to encourage applicants to this court to take heed to another principle-the principle that litigation must at some definite point be put to an end (citation). It is a principle reflected in the statutes which limit our jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limits because

> some event occurred in the lower court after judgment was rendered which is of no impact to the matters to be dealt with on review." Federal Trade Commission v. Minneapolis-Honeywell R.R. Co., 334 U.S. 206, 213 (1952). See also Matton v. Steamboat Co. v. Murphy, 319 U.S. 412, 419 (1943).

Rule 4(a) of the Federal Rules of Appellate Procedure is more precise, more directive oriented and less susceptible to misinterpretation than its predecessor, Federal Rule of Civil Procedure 73. A district court judge is not an expert on appellate procedures. The defendant had an affirmative duty to investigate the rules prior to filing its appeal. Its failure to do so cannot be mitigated by a misunderstanding of the rules by the district court when those rules define clearly when a notice of appeal must be filed in the federal courts of appeals. In this regard, the Emergency Appeal court's observations are aptly noteworthy:

> "We strongly believe that professional standards require counsel to be familiar with, or at least make a reasonable effort to learn the rules of the courts in which they practice. The rules of the court are published. . . .The

> court has circulated copies of its rules to the clerks of all federal courts. We are unable to conclude that counsel's failure to acquaint himself with the basic requirements for the filing of his client's notice of appeal can properly be described as constituting 'unique circumstances' . . . " Reed v. Kroger, 478 F.2d 1268, 1271-72 (Em. App. 1973).

The majority below resorted to a procedure which affects a final judgment by construing action which would otherwise be considered untimely and unable to alter the time for appeal under the Rules. If their view is correct, that mere reliance on the district court's interpretation of the rules is sufficient under Thompson, then it follows that the finality of adjudication in the federal court ultimately depends on the court's self-restraint.

Thus, this Court is presented with an opportunity to clarify its per curiam decisions in Thompson and Wolfsohn, decisions in which four dissenting Justices objected to the extension of Harris beyond its peculiar facts. By accepting this petition and ruling upon this case the Court can re-establish finality of adjudication in the federal courts and stem the flow of cases creating

exceptions to Rule 4(a) of the Federal Rules of Appellate Procedure.

CONCLUSION

For the reasons set out above, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and the decision of the Court of Appeals for the Seventh Circuit should be reviewed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNE NEEDHAM,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	NO. 76 C 1101
	)	
WHITE LABORATORIES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Anne Needham is a 26-year old female. On March 7, 1974, she was diagnosed by doctors at the Mayo Clinic to be suffering from vaginal clearcell adenocarcinoma--a cancer of the vagina. On March 8 Ms. Needham underwent radical surgery for her condition. Though apparently successful in treating her cancer, plaintiff has been left with a number of serious and permanent disabilities.

In 1976, seeking comepensation for the harms suffered as a result of her illness, Ms. Needham filed this products liability lawsuit against White Laboratories, a division of Schering-Plough, Inc. White Laboratories was themanufacturer and distributor during the early 1950's of a substance

known as dienestrol, which is a synthetic estrogen compound that, along with diethylstilbestrol (DES) another synthetic estrogen, was widely used during the late forties and early fifties as a preventive for miscarriages, as well as for certain other female problems. Plaintiff claims that it was her mother's use of dienestrol during the time she was pregnant with plaintiff that led to plaintiff's cancer and the 1974 operation. Plaintiff's complaint against White contained two counts, the first sounding in strict liability, and the second sounding in negligence.

A three-part trial was held. After two initial mistrials, a jury found, on May 24, 1979, that plaintiff's claim was not barred by the statute of limitations. Subsequently, a new panel of jurors heard arguments and evidence, first on the issue of liability (August 13 - August 23) and then, after a unanimous finding of liability against the defendant, on the issue of damages (August 23 - August 27). On August 27 the jury awarded plaintiff damages of $800,000. Nine days later defendant filed this post-trial motion. Defendant seeks a judgment in

its favor notwithstanding the jury verdict, or, failing that, a new trial on the issue of liability along.

The principal issues raised by defendant's motion are five in number:

(1) Whether plaintiff met her burden of proof on the issue of causation.

(2) Whether plaintiff met her burden of proof on the issue of whether White Labs knew or should have known, prior to 1952, that dienestrol would cause cancer in the offspring of women who took the drug.

(3) Whehter this court was correct in its decision to admit evidence as to the efficacy of dienestrol as a miscarriage preventive.

(4) Whether this court's instructions on the nature of strict liability were correct; and

(5) Whether there is a need for a new trial in view of certain statements made by plaintiff's counsel to the news media during the trial.

Each issue is considered in turn.

1. The Evidence of Causation.

Defendant argues that the only expert produced by plaintiff who gave unequivocal testimony as to the causal link between ingestion of dienestrol during pregnancy and the development of clearcell adenocarcinoma could not have been credited by any rational juror. Defendant further

argues that the other experts produced by plaintiff were unwilling to affirm anything more than the high probability that such a causal linkage exists. Defendant concludes by asserting that a mere showing of probability does not satisfy plaintiff's burden on the issue of causation.

The first step of defendant's argument is valid. For the purposes of the motion for a judgment N.O.V. this court is entitled to find that the testimony of the only witness who expressly supported plaintiff's causal claims was not creditable.

Dr. Albrecht Schmitt gave the following testimony:

> Q. In your opinion within a reasonable medical probability, indeed, certainty, does this young woman have the disease because of this drug?
>
> A. That is correct.

While such evidence would normally suffice to support plaintiff's burden, Dr. Schmitt's testimony did not stand uncontradicted on the record.

The most serious of these contradictions emerged during Dr. Schmitt's own cross-examination. Thus, despite

his stated certainty as to the cause of Anne Needham's cancer, Dr. Schmitt was forced to admit that in testifying in another case he had given some highly inconsistent evidence:

> Q. Doctor, you gave testimony in another United States District Court, did you not?
>
> A. That is correct.
>
> . . . .
>
> Q. And that was on March 23rd of 1978, isn't that right, and you recall that Judge Stern asked you some questions, don't you?
>
> A. Certainly.
>
> . . . .
>
> Q. Judge Stern said: "I gather from what you say that there is nobody in this world, no doctor in this world that understands exactly what in the human body causes, furthers or promotes cancer, is that right?" And you answered: "That is correct."
>
> THE COURT: Did you give that answer?
>
> A. Yes.

Morover, on being pressed by defendant's counsel in this case, Dr. Schmitt was forced to conceed that he had not changed his mind on this point:

> Q. We don't have enough scientific evidence right now, do we doctor, to completely understand the process in which cancer begins, develops, metasticizes, and the

like of that, isn't that right? . . .

A. Yes.

Dr. Schmitt then made a third admission on cross-examination casting serious doubt on the credibility of his causal assertions:

Q. No doctor other than yourself has written in any journal anywhere at anyttime that DES causes cancer, isn't that a fact, Dr. Schmitt?

A. Sir, I have written it, yes.

Q. You are the only doctor that has ever done that, isn't that a fact, Dr. Schmitt?

A. I don't know. Somebody else may have written it. . . . .

Q. To your knowledge, Doctor --

THE COURT: Are you aware of any? Are you aware of any?

A. No.

But even these admissions of Dr. Schmitt's were not the sole evidence on the record contradicting his flat causal assertion. For in addition to Dr. Schmitt's testimony, several of plaintiff's other experts rejected his claim that there is a demonstrated causal relationship between vaginal cancer and defendant's product. Thus, Dr. John-Gunnar Forsberg, on plaintiff's direct examination,

testified that,

> We cannot prove from a scientific basis that we have a cause and effect relationship between ingestion of synthetic estrogens during pregnancy and development of clearcell adenocarcinoma.

Similarly, plaintiff's treating physician bluntly stated that,

> I have no idea what causes clearcell adenocarcinoma of the vagina.

In sum, the credibility of Dr. Schmitt's causal claims was, on this record, highly suspect.

Indeed, given the full extent of Dr. Schmitt's testimony, and given the contradicting evidence of plaintiff's other experts, the court is persuaded that Dr. Schmitt's categorical causal claims were so suspect that Illinois law would not have permitted the jury to credit them. In Osco Drug v. The Industrial Commission of Illinois, 36 Ill.2d 361 (1967), the Illinois Supreme Court overturned the trier of fact's verdict for the plaintiff because that verdict relied on expert testimony which was shown on the record to be against the manifest weight of contemporary scientific learning. Here Dr. Schmitt not only admitted that his testimony was eccentric,

he also admitted that even he did not believe that science has discovered the cause of cancer. Moreover, his causal assertions were directly contradicted by plaintiff's experts. In view of the Illinois court's ruling in Osco, Schmitt's initial causal assertions need not be given any weight. Thus, the record contains no direct evidence for the proposition that plaintiff's cancer was caused by her mother's use of defendant's product.

Accordingly, plaintiff's showing of causation must stand or fall on the testimony establishing a "probable" link between dienestrol and clearcell adenocarcinoma.

The record contains two sorts of evidence that such a relationship exists. The first is the testimony of Dr. John-Gunnar Forsberg, recognized by both parties as an outstanding expert in this particular filed. Dr. Forsberg testified as to a series of experiments he had done studying the effect of various natural and synthetic estrogens on the genital tract of neonatal femal mice. The neonatal

period is the week after birth. During this period of time the mouse genital tract is at a state of development which corresponds to the stage of development achieved by the genital tract in the female human fetus before the 18th to 20th week. Accordingly, results achieved with neonatal mice are viewed as providing a good "model" of human fetal development. Summarizing the result of his mouse experiments, Dr. Forsberg concluded that, "DES dienestrol, seventeen beta estradiol [a naturally occurring estrogen], and seventeen alpha estradiol [another naturally occurring estrogen], are all effective in inducing permanent abnormalities in the uterine cervix." He additionally concluded that these results were of significance in explaining the incidence of clearcell adenocarcinoma in human beings:

> Q. Dr. Forsberg, based on your education, training, experience, studies, animal experiments, as well as review of the medical literature, do you have an opinion based on a reasonable degree of medical probability, as to whether or not there is a causal relationship between the taking of synthetic estrogen by a pregnant woman and t[illegible] subsequent

development of adenocarcinoma of the cervical vaginal area in the daughter born of that pregnancy? . . . .

A. . . . My opinion is that there is no -- that there is no scientific proof for a cause and effect relationship, but we have indications for an association.

Q. Would you define what you mean by "association"?

A. I mean that ingestion of synthetic estrogen provides a basis for development of clearcell adenocarcinoma, but I cannot say that there is a, an effect. Some other factor could interfere in the development.

The second sort of evidence in the record linking Mary Needham's use of dienestrol to Anne Needham's cancer is of a statistical nature. The strongest part of the record in this regard is the evidence given by Dr. Michael Shimkin, one of the earliest and still among the most eminent researchers in this field. Dr. Shimkin's testimony consisted of his description and evaluation of the 1970-1971 studies preformed by Dr. Herbst. He summarized these studies as follows:

They did a study of seven cases [of clearcell adenocarcinoma] to which one additional one is added, appropriate controls, carefully managed by aides, andother characteristics.

> The one characteristic that stuck out was that all but one of the cases of the clearcell adenocarcinoma of the vagina has a history of ingestion of maternal diethystilbestrol during pregnancy.

During his re-direct examination, Dr. Shimkin was asked to explain more fully the significance of Dr. Herbst's findings. After pointing out that the "P value" of the coincidence of maternal use of DES and vaginal cancer observed by Herbst was .00001, he went on to explain that this meant that the likelihood that the coincidence was merely accidental was only one in one hundred thousand:

> Q. . . . And what is a 100,000 to 1 probability?
>
> A. Well, 100,000 -- well, the fact that the difference between these two groups, the control groups and the ones that had the maternal history of estrogen ingestion, that the estrogen ingestion had something to do with the condition, adenocarcinoma, of the vagina in these eight women.

Dr. Shimkin also testified, on direct, that the Herbst results had received "a quick, clear confirmation" by Dr. Greenwald in New York. Finally, he gave his

opinion as to the significance of the Herbst-Greenwald findings for explanation of this particular case of clearcell adenocarcinoma:

> Q. Doctor, assuming a young woman is diagnosed to have a clearcell adenocarcinoma, and that as a history, her mother has taken DES or dienestrol, do you have an opinion, within reasonable medical certainty, whether there was . . . a cause and effect? . . .
>
> A. Yes. The chances of a causal relationship are extremely high. . . .
>
> Q. Doctor, when you say "very high", what do you mean by that? . . .
>
> A. In biology 100 percent certainty is an impossibility. Already there may very well be individual rare, rare cases in which this factor was not identifiable. Maybe the estrogen came from some other source in dogs and others. But the chances biologically are up to what I think in common parlance would be known as pretty certain. Now, I am not going to go for 100 percent, but make it, you know, 99.5 or something of that sort.

In short, plaintiff's credible experts testified that maternal ingestion of dienestrol could "provide a basis" for a second generation incidence of vaginal cancer, and that, where the daughter of a dienestrol-using mother does in fact contract this condition, the chances of a causal relationship are "extremely

high." Defendant's argument about this showing is essentially a very simply one: Since none of this testimony is inconsistent with the portions of the record establishing that "we don't have enough scientific evidence right now . . . to completely understand the process in which cancer begins, develops, metasticizes, and the like," and since, even Dr. Herbst has recognized that, "it is inaccurate to state that we have claimed that there is cause and effect between DES and these clearcell adenocarcinomas," the production of testimony tending to show that such a causal relationship is highly likely does not establish any basis from which the jury could rationally have inferred anything at all about the origins of Anne Needham's specific tumor.

A search of the Illinois cases has not revealed any dealing directly with the issue of jury reliance on probabilistic evidence like that used here. Still, the general rule governing inferences from circumstantial or conflicting

evidence is well established:

> "Liability may not be based on imagination, speculation, or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting each material allegation of the complaint or some circumstantial evidence from which inferences of such facts clearly preponderate." Tiffin v. Great Atlantic and Pacific Tea Co., 18 Ill.2d 48, 60 (1959).

Defendant argues that proper application of this rule would have removed the causation issue from the provenance of the jury. However, all of the cases cited to this effect involved showings of causation which either were wholly discredited on the record, Osco Drug v. Industrial Commission of Illinois, supra, or which failed completely to establish that the proferred explanation of plaintiff's injury was any more likely that the alternative explanations suggested by the defendants. Tiffin, supra; Wiebel v. Mid-Continent Bottlers, Inc., 70 Ill. App.3d 224 (1979); Bunn v. Peavler, 6 Ill. App.3d 972 (1972); Shramek v. General Motors Corp., 69 Ill. App.2d 72 (1966); Shaw v. Swift & Co., 351 Ill. App. 135 (1953). Here Dr. Shimkin's interpretation of the Herbst

study is uncontradicted, thus distinguishing it from the testimony discredited in Osco. Accordingly, the issue is whether his testimony could have supported a jury inference tht the likelihood of Ms. Needham's condition having been caused by her mother's ingestion of dienestrol rises above the level of mere possibility. Several jurisdictions have evaluated probabilistic testomony as to the cause of a particular tumor from the perspective of a motion for judgment N.O.V. The cases are split as to the sufficiency of such evidence.

Those cases which hold that probabilistic evidence as to the origin of a specific tumor is not sufficient to support a legally significant inference of causation have argued the point on the same grounds here asserted by defendant. Beginning from the premise that nobody really knows what causes any particular cancer, they have proceeded to the conclusion that, as a result, any probabilistic generalization about the carcinogenic effects of a

particular substance or type of event cannot illuminate the history of a particular plaintiff's illness. E.g., Tonkovich v. Department of Labor and Industries of the State of Washington, 195 P.2d 638 (Wash. 1948); Boyer v. Department of Labor and Industries of the State of Washington, 295 P. 737 (Wash. 1931). As it happens, most of the cases to employ this reasoning have involved so-called "traumatic" tumors; htat is, tumors allegedly caused or aggravated by a physical blow. Because the medical profession appears to be bitterly divided over the existence of this pheonomenon, see Insurance Co. of North America v. Myers, 411 S.W.2d 710 (Tex. 1967), and cases cited therein, a jury's evaluation of any specific diagnosis relying on this theory may well be mere speculation, see Osco Drugs, supra. The question for this controversy is whether the uncertainty of medical knowledge in this area should be permitted to support broad dicta ignoring the state of medical knowledge in a

totally different area.[1]

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1. It should be noted at this point that some courts and commentators have disapproved of the use of probabilistic testimony in any circumstances, regardless of the reliability of the theory underlying the probability calculation. In People v. Collins, 438 P.2d 33 (Cal. 1968), the California Supreme Court adopted this rule for criminal trials. The differing standard of proof in that case suffices to distinguish it from this one. In Smith v. Rapid Transit, Inc., 58 N.E.2d 754 (Mass. 1954), however, the Supreme Court of Massachusetts imposed a flat ban on probabilistic evidence in a civil case. There plaintiff had demonstrated that his car had been struck by a bus, and that defendant corporation was the only one to regularly run buses down the street where the accident occurred at the time when the accident occurred. The court held that this showing did not suffice to send the case to the jury.

Even Smith, however, is readily distinguishable from this case. In Smith the jury was asked to draw an inference from ambiguous facts without the slightest guidance. Here, on the other hand, the jury is being asked to draw an inference from ambiguous facts with the aid of precise, uncontradicted, scientifically reliable expert testimony as to the likelihood that the inference is valid.

A number of courts have suggested that it should not, and have (again in dicta) approved the use of probability evidence in appropriate circumstances. Thus, for example, in Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969), the Supreme Court of Texas affirmed a court of appeals' decision overturning a jury verdict which had found an employer liable under the Workmen's Compensation Laws for plaintiff's cancerous condition. Plaintiff had alleged that his cancer was caused by his occupational exposure to radio-active material. Noting that the experts had testified only that radiation was a "possible" cause of plaintiff's condition, and that several of them expressly foreswore any attempt to estimate the probability of such a link, the court concluded that plaintiff had failed to shoulder its evidentiary burden on the causation issue. It went on to observe, however, that this need not have been the case:

> "Probabilities of causation articulated by scientific experts have been deemed sufficient to allow a plaintiff to proceed to the jury. For while a scientific training conceives of anything as possible,

> coincidence can be measured and generalizations similar to but not the same as uniform physical laws can be drawn from the probability of a result following a cause. In fact, the relationship between a cause and its effect per se without theoretical explanation, can be nothing more than probable relationships between particulars." 440 S.W.2d at 46. (Emphasis added.)

Consistent with such reasoning, the Kentucky Supreme Court has stated that, while an expert opinion asserting causation and expressed "in the language of probability" does not compel a finding of fact favorable to the plaintiff, such an opinion "could have been regarded as substantial evidence in support of the board's findings." Logan Co. v. Amic, 479 S.W.2d 1, 3 (ky. 1972).[2]

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2. A number of courts have held that even the traumatic cancer cases present suitable jury questions. Daly v. Bergstedt, 126 N.W.2d 242 (Minn. 1964); Custer v. Higgins Industries, 24 So.2d 511 (La. Ct. of App. 1946); Shaw v. Owl Drug, 40 P.2d 588 (Cal. 1935). These decisions have reasoned that any dispute between witnesses, even expert witnesses, is properly left for the jury. Here there is no dispute on the record as to whether or not

In this case the expert testimony presented to this jury is considerably more persuasive than the highly controversial hypotheses offered in the cases cited by defendant. Here Dr. Shimkin testified, relying on the results of the 1970-1971 Herbst studies, that there is only a one in 100,000 chance that the coincidence of a case of clearcell adencarcinoma with a history of maternal ingestion of dienestrol is accidental. He further testified that such statistical corollations, while not constituting evidence of a chain of biological cause and effect, do serve as the functional equivalent of such evidence and that the confusing concept of "causation" has all but passed out of common biological parlance. Indeed, his testimony clearly indicates that it was this linguistic discomfort with the difference between legal and

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2 (Cont'd.)

dienestrol is a carcinogen and none as to the likelihood that maternal ingestion of dienestrol is causally related to the incidence of clearcell adenocarcinoma in femal offspring. The sole question is whether demonstration of a likely relationship satisfies a plaintiff's causal burden.

medical "cause" that led Dr. Shimkin to refuse to unequivocally assert that Herbst studies establish a causal connection:

> Q. Okay, Now you are not saying, are you, that a statistical assocation implies cause and effect?
>
> A. That's almost a metaphysical kind of statement. Biologists seldom talk about cause, and they mean somewhat different things than legal people do, but I think that an assurance of 100,000 is so close to what you people call cause that I would be happy with the term.
>
> Q. Doctor, didn't you say in your deposition that statistical corollations do not imply causal or direct connections?
>
> A. Absolutely. Of course not.

Cf. Small, Gaffing at a Thing Called Cause, 31 Texas L. Rev. 630 (1953).

In short, despite the fact that the record supports the conclusion that the scientific community does not "complete understand the process in which cancer begins, develops, metasticizes and the like," it could also support the conclusion that the medical community is also aware that there are certain conditions which are capable of generating--by whatever means--cancerous

growths. Sepcfically, the jury was entitled to conclude on this record that maternal inegstion of synthetic estrogens during pregnancy is one such condition. It was also entitled to conlude that reputable statistical analysis of confirmed data has led qualified experts to believe that the coincidence of this potentially carcinogenic condition with the actual fact of a case of clearcell adenocarcinoma makes "the chances of a causal relationship . .. . extremely high." Finally, the jury was entitled to conclude, by crediting Dr. shimkin's testimony to this effect, that such statistically well established genrealizations are equally to reliable as, and the functional equivalents of, flat causal pronouncements. These propositions taken together make the causal link between Anne Needham's condition and her mother's use of dienestrol more than a mere possibility. Certainly, the jury's conclusion to this effect was far removed from the acts of "imagination, speculation, [and] mere conjecture" disapproved by Tiffin. Accordingly,

the court holds that there was sufficient evidence to support the jury finding of casuation. Cf. Mahr v. G. D. Searle & Co., 72 Ill. App.3d 540, 565, 573-574 (1979). (Permitting disputed expert testimony as to causal relationship bewteen deceased's use of envoid and deceased's heart attach to go to jury.)

2. The Evidence of Pre-1952 Knowledge.

White Laboratories correctly points out that if the state of medical knowledge in 1952 had not been such as to put it on notice that dienestrol could have the effects here complained of, White would have been under no obligation to test for or warn about these risks at the time Mary Needham was using its product. Woodill v. Parke Davis & Co., 58 Ill. App.3d 349 (1978). White additionally contends that, in fact, the record does not support the view that Dienesterol could reasonably have been suspected of causing second generation carcinogenic effects in man. Dr. Shimkin provided the evidence relied on by plaintiff to meet this contention. He testified that, by the 1940's the scientific community viewed the eventual demonstration of synthetic

estrogen's cancerous effects on man to be a "lead pipe cinch", and that drug companies should have been on notice of this risk. He also describes in extensive detail a number of studies which, prior to 1952, had demonstrated that introduction of a carcinogen into the system of a pregnant animal could affect that animal's offspring. Finally, he concluded that any firm planning in 1952 to market a drug like dienestrol for use by pregnant women should have viewed animal testing for intergenerational effects as "essential" and should have warned of the risk of cancer. It is uncontested that White Labs took neither of these steps.

White seeks to undercut this showing by reference to a large number of passages in the record indicating that all of this pre-1952 evidence was produced in studies involving laboratory animals, and that, as of 1952, the scientific community did not widely credit such experiments as being informative about human biology. While the record might well have supported a jury verdict based on such reasoning, it did not compel one. Thus, after having admitted

on cross-examination that extrapolation from laboratory animals to man was viewed as conjectural and controversial at the time in question, and after further admitting on recross that he had, in 1970, characterized the Herbst studies as "a bolt out of the blue." Dr. Shimkin clarified these responses on his second redirect examination. At that time he testified that the Herbst studies had been surprising only with respect to "the specific site [of the human effect] and the specific modus operandi, the way it was elicited." He further testified that, on the basis of the animal studies, the scientific community had "anticipated" that synthetic estrogens would be shown to have some carcinogenic effects in man "ever since the 1940's and really the surprise of it was that it took so long to do." Similarly, Dr. Forsberg, while recognizing the broad skepticism then prevalent among clinicians regarding animal studies, was nonetheless willing to testify that, by the early fifties,

> "Among laboratory workers, among people working in the laboratories there was often

> pronounced an attitude that: Be careful, be careful. You don't know what will happen if you use these substances in the human.

The court cannot conclude that the jury, on this record, had no reasonable basis for finding that White was on notice as to the dangers of dienestrol.

3. Admissibility of the Efficacy Evidence.

The third significant issue raised by defendant's post-trial motion is the propriety of the court's decision admitting evidence as to the effectiveness of dienestrol as a miscarriage preventive. White argues that this evidence was not relevant to the question of its liability and that it prejudiced the jury. In its memorandm opinion of August 13 this court explained its decision to admit this evidence. Nothing that happened at trial has altered the court's conclusions.

The August 13 opinion relied heavily on the language and rationale of Comment k to Section 402A of the Restatement of Torts (Second). In Illinois the normal rule of strict liability holds a manufacturer responsible for failure to warn of harmful effects of a product even

where those effects are unknown, unknowable, or ottherwise unpreventable at the time the product leaves the control of the manufacturer. Cunningham v. MacNeal Memorial Hopsital, 47 Ill.2d 44 (1970); Rucker v. Norfolk and Western Ry. Co., 64 Ill. App.2d 770, 781-781 (1978). Comment k is recognized as an exception to this rule. Cunningham, supra, at 456. The Comment is specifically tailored to cases, like this one, involving inherently dangerous drugs:

> "K. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended or ordnary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of . . . many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even purity of ingredients, but such

> experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desireable product, attended with a known but apparently reasonable risk." (Emphasis in original).

For White to take advantage of the special provisions of Comment k it must be found that dienestrol was the sort of drug whose distribution was included in the concern of the drafters; that is, the sort of "apparently useful and desirable product" which would justify curtailment of the normal strict liability standard. It would have been impossible for the jury to have made this determination if it had not been provided with evidence as to the drug's "apparent" utility at the time it was marketed. Evidence as to dienestrol's efficacy was, obviously, highly relvant to this issue. Accordingly, not only was admission of the evidence proper, it was necessary, and a decision excluding the evidence might well have improperly

prejudiced plaintiff.

4. The Instructions.

The fourth issue of signifiance raised by defendant's post-trial motions has to do with the instructions given to the jury on plaintiff's burden under the strict liability count of her complaint. The portion of the instructions objected to is the following:

> "The plaintiff has the burden of proving by a preponderance of the evidence each of the following propositions in Count 1 of her complaint: First, that the defendant knew, or reasonably should have known in 1952 that dienestrol could cause cancer to the female offspring of a person who was using it to prevent miscarraige, or that dienestrol was not apparently useful and desirable in 1952 in preventing miscarraiges. And, second, that the plaintiff was injured; and third, that dienestrol was a proximate cause of the plaintiff's injury."

Defendant argues that this instruction permitted the jury to hold it liable not only for the side effects which dienestrol foreseeably would cause, but also for the side effects which dienestrol conveivably "could" cause.

The short answer to defendant's argument is that defendant did not object to this language at

the time the instruction was given. Indeed, the record indicates that defendant expressly agreed to the change in the language from "would" to "could" during the final conference on instructions. Having failed to object at either of these points in the proceedings, defendant cannot be heard now, after the case has gone through to a jury verdict, to contend that the instructions were improper. F.R. Civ. P. 51. Defendant's contention that a timely objection and argument would have been futile is simply not supported by the record.

The court further notes that, even had this objection been timely, it is doubtful that it would have been persuasive. The instruction objected to was merely meant to summarize the more detailed description of plaintiff's strict liability burden which had gone before. The full explanation of the law as given in the charge left the jury with little doubt that defendant was to be held liable only for the foreseeable dangers of dienestrol. Additionally, the court notes that in Illinois, a drug manufacturer is required to warn physicians of "possible adverse reactions" which may result from the use of its

product, Mahr v. G.D. Searle & Co., 72 Ill. App.3d 540, 549 (1979). The instruction actually given seems to be a much closer approximation of this standard than the one proposed by defendant.

5. The Statements to the Press.

Recognizing the somewhat sensational nature of this lawsuit, and the risk of prejudicial publicity, defendant has, throughout this case, properly sought to minimize exposure in the press. Consistent with this goal, defendant secured from plaintiff's attorneys an unequivocal representation to the court that nothing would be said for publication during the trial. Immediately following the jury verdict on liability, however, plaintiff's chief counsel, Lawrence Charfoos, granted both a newspaper and a radio interview. In the newspaper interview he was quoted as having compared plaintiff and other vaginal cancer victims to the victims of the drug thalidomide. Though counsel initially denied having initiated the thalidomie comparison, examination of the reporter involved suggested that counsel had indeed raised the issue. Upon additional questioning, counsel admitted that this was

the case. this misconductof counsel was particularly egregious in view of the fact that actions of this same attorney had compelled the court, in the interest of preserving a fair trial for both parties, to declare two previous mistrials. In view of all these factors, defendant was fully justified in presenting its motion for a mistrial and in renewing the motion in the form of this request for a new trial.

Still, the motion for a new trial cannot be granted. Upon disclosure of counsel's actions, the court determined by a voir dire of the jury that only one juror had been exposed to the publicity. In an interview in chambers that juror represented to the court that he had not been prejudiced by the publicity, that he had not discussed it with the other jurors, and that he would not do so in the future. In the absence of any actual prejudice to the defendant, plaintiff should not be made to suffer for the behavior of her attorney, particularly in view of the fact that other remedies are available to deal with his conduct. It was for these reasons that the motion for a mistrial was denied. There would be no justification to grant a new trial on the

ground asserted here.

Defendant has argued a number of additional grounds for its motion, all of which have been considered. None of the additional grounds set forth is of sufficient stature to justify the reversal of the jury's considered verdict of a new trial.

Defendant's post-trial motion is denied.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: January 10, 1980

Opinion by Judge Bauer
Judge Fairchild dissenting

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1981

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge

ANNE NEEDHAM,	)
	) Appeal from the
Plaintiff-Appellee,	) United States Dis-
	) trict Court for the
No. 80-1579 -Vs-	) Northern District of
	) Illinois, Eastern
WHITE LABORATORIES, INC.,	) Division.
	) No. 76-C-1101
Defendant-Appellant.	) Judge Bernard M. Decker

This cause was hear on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED AND REMANDED in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

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*The Honorable Eward Dumbauld, Senior Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1579

ANNE NEEDHAM,

Plaintiff-Appellee,

v.

WHITE LABORATORIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 1101—Bernard M. Decker, *Judge.*

ARGUED SEPTEMBER 9, 1980—DECIDED JANUARY 27, 1981

Before FAIRCHILD, *Chief Circuit Judge,* BAUER, *Circuit Judge,* and DUMBAULD, *Senior District Judge.**

BAUER, *Circuit Judge.* In 1946 the Food and Drug Administration ("FDA") authorized defendant-appellant White Laboratories, Inc. ("White"), to market dienestrol, a synthetic estrogen, for the treatment of menopausal symptoms and suppression of lactation.[1] In 1950 the

* The Honorable Edward Dumbauld, Senior Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

[1] In 1941 the FDA had authorized other drug manufacturers to market diethystilbestrol ("DES"), another synthetic estrogen, for use in the treatment of these two conditions. Although dienestrol and DES possess different chemical

(Footnote continued on following page)

FDA authorized White to market dienestrol for treatment of threatened and habitual miscarriages.

Mary Needham, plaintiff-appellee Anne Needham's mother, took dienestrol in 1952 during her pregnancy with plaintiff. In early 1974 Dr. Jerome Warren informed Anne Needham that she had clear cell adenocarcinoma, a rare form of vaginal cancer. Needham claims that the dienestrol her mother took in 1952 is the proximate cause of her cancer.

The trial of this cause was trifurcated. A jury was impaneled to determine whether the Illinois statute of limitations[2] barred this suit. The jury found that the Illinois two-year statute of limitations did not bar plaintiff's cause of action. A new jury was impaneled to decide the liability and damages issues. That jury returned a verdict for plaintiff and, after the subsequent damages trial, awarded the plaintiff $800,000. White appeals. We reverse and remand.

I

Before we reach the merits of this appeal, we must address Needham's claim that we lack jurisdiction to decide this case because White's notice of appeal was untimely.

The court of appeals lacks jurisdiction to decide an appeal if notice of appeal is not timely filed, *United States v. Robinson*, 361 U.S. 220 (1960), and the

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[1] *continued*
structures, they are both pharmacologically identical to natural estrogen. In 1947 the FDA authorized drug manufacturers to market DES for treatment of threatened and habitual miscarriages.

[2] The United States District Court for the Northern District of Illinois had jurisdiction of this suit pursuant to 28 U.S.C. § 1332. The statute of limitations of the state in which the federal court sits governs diversity suits. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Thus, the Illinois statute of limitations governs in this case.

appellate court cannot extend the time limitation. Fed. R. App. P. 26(b). Notice of appeal must be filed with the Clerk of the District Court within thirty days from the date of judgment unless a timely post-trial motion tolls the running of the appeal time. Fed. R. App. P. 4(a). Rule 4(a) delineates four post-trial motions, which, if timely filed, will toll the running of the thirty-day appeal time.[3] If any of these four types of post-trial motions is filed within ten days of entry of judgment, the thirty-day limitation is tolled and begins to run anew upon entry of the order denying or granting the post-trial motion. Fed. R. App. P. 4(a).

Defendant White filed a post-trial motion for judgment notwithstanding the verdict within ten days of the entry of judgment. This motion tolled the thirty-day limitation until entry of the district court order denying or granting the motion. The district court denied the motion on January 14, 1980, and the thirty-day time began to run anew, terminating on February 13, 1980. On February 4, 1980, White filed a motion for reconsideration of the January 14, 1980, denial of the motion for judgment notwithstanding the verdict.

A motion to reconsider an order denying a timely post-trial motion does not toll the thirty-day limitation period that began to run when the first post-trial motion was denied.[4] *Wansor v. George Hantscho Co., Inc.*, 570

[3] The four motions which will toll the notice of appeal limitation are (1) a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure; (2) a motion to amend or make additional findings of fact pursuant to Rule 52(b) of the Federal Rules of Civil Procedure; (3) a motion to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure; and (4) a motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. Fed. R. App. P. 4(a).

[4] Defendant White contends that this February 4 motion was filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure which permits the district court to relieve a party from a final judgment for the following reasons:

(Footnote continued on following page)

F.2d 1202, 1206 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979). *See also* 9 Moore's Federal Practice ¶ 204.12[1] at 4-67 (2d ed. 1980). Thus, defendant's notice of appeal filed on April 21, 1980, ninety-nine days after entry of the district court order denying White's timely Rule 50(b) post-trial motion, was untimely, but since this case falls within the narrow exception recognized in *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) (*per curiam*), we have jurisdiction to decide this appeal.

Notwithstanding the requirements of Rule 4(a), the appellate court will have jurisdiction to decide an appeal which is untimely filed if the defendant relied to his detriment on the assurance of the district court that an untimely post-trial motion tolled the thirty-day notice of appeal time. *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) (*per curiam*). The defendant in *Thompson* filed a post-trial motion twelve days after entry of judgment. The motion thus was untimely and could not toll the running of the notice of appeal time. The Government, however, did not object as to the timeliness of the motion, "and the trial court specifically declared that the 'motion for a new trial'

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[4] *continued*

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

A Rule 60(b) motion never tolls the notice of appeal time. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978).

was made 'in ample time.'" 375 U.S. at 385. The notice of appeal was filed within sixty days of entry of the denial of the post-trial motion, but not within sixty days of the entry of judgment.[5] The Supreme Court held that where the defendant relies on the plaintiff's failure to object as to timeliness and on the district court's explicit assurance that the motion is timely, the defendant is entitled to have his appeal decided on the merits if notice of appeal is filed within the assumedly new limitation period that commenced when the district court ruled on the post-trial motion. *Id.* at 386-87.

At the hearing on White's motion to reconsider conducted on February 5, 1980, plaintiff's counsel informed the district court that the motion was timely.[6] White's counsel specifically asked the district court whether the motion to reconsider tolled the time for appeal, and the district court assured defendant that the motion tolled the appeal time until it disposed of the motion. The district court denied the motion for reconsideration on March 20, 1980. White filed notice of appeal on April 21, 1980, within the assumedly new limitation period.[7] Defendant White should not be penalized for relying on the district court assurance that notice of appeal filed within thirty days of its disposition of the motion to reconsider would be timely.

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[5] If the United States or any United States officer or agency is a party, notice of appeal must be filed within sixty days. If the Government is not a party, notice of appeal time is limited to thirty days. Fed. R. App. P. 4(a).

[6] White claims that plaintiff has waived any objection as to the timeliness of this appeal. Timely filing of a notice of appeal is mandatory and jurisdictional. *United States v. Robinson*, 361 U.S. 220 (1960), and, thus, can never be waived by the parties.

[7] The thirtieth day was April 19, 1980, which was a Saturday. If the last day of the period is a Saturday, Sunday, or legal holiday, the period runs until the next business day. Fed. R. Civ. Proc. 6(a). Thus, the notice of appeal period terminated on Monday, April 21, 1980.

II

A

White claims that the Illinois statute of limitations bars this suit. The statute provides that "[a]ctions for damages for an injury to the person . . . shall be commenced within two years next after the cause of action accrued." Ill. Rev. Stat. ch. 83, § 15. White contends that Needham's cause of action accrued when she learned of her injury. Because Needham learned of her injury on March 1, 1974, when her doctor informed her that she had vaginal cancer, White argues that this suit filed on March 22, 1976, was commenced after the two-year limit.

White raises this novel interpretation of the Illinois statute of limitations for the first time in this Court. White agreed below that Needham's cause of action accrued when she learned of her injury *and* knew or should have known that the dienestrol caused her cancer. SOL at 433, 456.[8] The trial court so instructed the jury without objection from defendant. SOL at 537. Having failed to object at trial, White has waived any argument on appeal. Fed. R. Civ. P. 51; *see United States v. White*, 607 F.2d 203, 205 (7th Cir. 1979); *Faulisi v. Daggett*, 527 F.2d 305, 310 (7th Cir. 1975). *See also Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 138-39 (3d Cir. 1973).

Moreover, the trial court's instruction accurately states Illinois law. The Illinois Supreme Court, in interpreting the applicable statute of limitation provision, held that a cause of action accrues when the plaintiff knows or should know of the injury and the defendant's error. *Rozny v. Marnul*, 43 Ill.2d 54, 69, 250 N.E.2d 656, 666 (1969). *See also Anderson v. Wagner*, 79 Ill.2d 295, 312, 402 N.E.2d 560, 564-67 (1979). In a case like Needham's where the plaintiff's injury is a disease,

> the limitations period does not commence when the plaintiff learns of his injury, but only after the

[8] Reference to the record of the statute of limitations hearing will be indicated by "SOL at ..... ."

> plaintiff "knows or has reason to know that he or she has a physical problem *and also that someone is or may be responsible for it.*"

Witherell v. Weimer, 77 Ill. App. 3d 582, 587, 396 N.E.2d 268, 272 (1979) (emphasis in original) (citations omitted). *See also Nolan v. Johns-Manville Asbestos & Magnesia*, 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979), and cases cited therein. Thus, the instruction given in this case was proper.

B

White claims that the jury finding that Needham did not know of the connection between her injury and the dienestrol her mother took before March 22, 1974, is not supported by the record. We disagree.

Needham testified that she first learned of the possible connection between her injury and the dienestrol in May 1974. SOL at 297. Her mother testified that neither she nor plaintiff knew of the relationship between the cancer and the dienestrol before May 1974. SOL at 261. The only evidence tending to prove that Needham knew or should have known of the connection between her injury and dienestrol before March 22, 1974, was the testimony of her father and her gynecologist, Dr. Jerome Warren. Needham's father testified that he knew of the connection between Needham's injury and the dienestrol on March 1, 1974, but that he did not discuss the possible connection with his daughter before March 22, 1974. SOL at 132, 143 & 188. Dr. Warren testified that he discussed the connection between the cancer and dienestrol with plaintiff and her mother at a meeting on March 2, 1974. SOL at 84. Plaintiff and her mother, however, testified that no meeting occurred on March 2, 1974, and Dennis Rauen testified that he was with Needham all day March 2, 1974. SOL at 230, 284, 395-99.

The jury's function is to resolve the conflicts in the testimony and weigh the credibility of the witnesses. Legally sufficient evidence in the record supports the jury's resolution of the conflicts in favor of the plaintiff.

and we affirm its finding that this suit is not time-barred.

III

White claims that the district court erred in permitting Needham to introduce evidence that dienestrol was not effective in preventing miscarriages. We agree with defendant and reverse and remand. In ruling that inefficacy evidence was admissible, the district court erroneously interpreted Illinois case law and the comments to section 402A of the Restatement (Second) of Torts.

A

Section 402A of the Restatement (Second) of Torts, which the Illinois Supreme Court adopted in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 621, 210 N.E.2d 182, 187 (1965), governs this cause of action. *See also Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194 (1980); *Cunningham v. MacNeal Memorial Hospital*, 47 Ill.2d 443, 266 N.E.2d 897 (1970). Section 402A provides that one who sells a product in a "defective condition unreasonably dangerous" is subject to strict liability for any harm caused by the product defect. A product may be in a "defective condition unreasonably dangerous" because the product is contaminated by an impurity or because the product is unaccompanied by a warning of the product's dangerous propensities or because, although the product is accompanied by a warning, the risk of danger outweighs the benefit attendant to use of the product.

Cunningham v. MacNeal Memorial Hospital, 47 Ill.2d 443, 266 N.E.2d 897 (1970), is the controlling Illinois Supreme Court decision concerning strict liability for a contaminated product. Cunningham contracted serum hepatitis after receiving a blood transfusion at MacNeal Memorial Hospital. The transfused blood contained serum hepatitis virus, an impurity that cannot be detected in the blood before it is transfused. The defendant argued that it should be exempted from

liability because it was impossible to discover the impurity. The Illinois Supreme Court rejected defendant's claim and held that section 402A imposes strict liability even where the manufacturer or seller has exercised all possible care in the preparation and sale of the product. The court noted that

> [t]o allow a defense to strict liability on the ground that there is no way, either practical or theoretical, for a defendant to ascertain the existence of impurities in his product would be to emasculate the doctrine and in a very real sense would signal a return to a negligence theory.

47 Ill.2d at 453, 206 N.E.2d at 902.

Second, the manufacturer will be strictly liable if it fails to warn of a known risk inherent in the product. Comment j of section 402A explains that a product may be unreasonably dangerous if the manufacturer fails to warn of an inherent danger.

> [T]he seller is required to warn [of a danger], if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of . . . the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.
>
> * * * *
>
> [A] product bearing such a warning, *which is safe for use if [the warning] is followed*, is not in defective condition, nor is it unreasonably dangerous.

Restatement (Second) of Torts, § 402A, Comment j (emphasis added).

In interpreting comment j, the Illinois Supreme Court in *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194 (1980), held that a drug manufacturer is strictly liable for failing to warn of an inherent product danger only if the manufacturer had knowledge, or by the application of reasonable, developed human skill and

foresight should have had knowledge, of the danger. *Id.* at 35, 402 N.E.2d at 200.

Third, a court will impose strict product liability even if a warning is given if the product remains unsafe when the warning is followed and the risk of danger outweighs any apparent usefulness of the product.

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an *apparently useful and desirable product*, attended with a known but apparently reasonable risk.

Restatement (Second) of Torts, § 402A, Comment k (emphasis added.)

The Illinois Supreme Court has not decided a comment k products liability case. In deciding *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970), the supreme court did, however, comment on the applicability of comment k. The court noted that comment k "relates only to products which are not impure and which, even if properly prepared, inherently involve substantial risk of injury to the user." *Id.* at 456, 206 N.E.2d at 904.

Other jurisdictions that have adopted section 402A have had occasion to interpret and apply comment k to cases before them. *See e.g., Werner v. Upjohn Co., Inc.*, 628 F.2d 848 (4th Cir. 1980); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 212 (9th Cir. 1968). The Fifth Circuit's decision in *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974), provides the most insightful analysis, which we adopt.

Anita Reyes developed poliomyelitis two weeks after she received the Sabin live poliomyelitis vaccine. She sued Wyeth Laboratories, the vaccine manufacturer, alleging that it had breached its duty to warn of the risk inherent in the vaccine. Section 402A governed. The court held that the vaccine was an "unavoidably unsafe product," and, thus, comment k applied. The court noted that "an unavoidably unsafe product is neither defective nor *unreasonably* dangerous if such a product is 'properly prepared, and is accompanied by proper directions and warnings.'" 498 F.2d 1274 (*quoting* Restatement (Second) of Torts, § 402A, comment k) (emphasis in original). The court adopted a two-step analysis. Once it is determined that the product is unavoidably unsafe and that the danger is warned against, it must be determined whether the product is so unsafe that marketing it at all is "unreasonably dangerous per se." In order to decide whether the product is unreasonably dangerous

per se, a court must balance the utility of the product against its dangers. If the product's usefulness outweighs its risk of danger, it must be determined whether the manufacturer sold the product with sufficient safeguards and warnings.

The court in *Reyes* found that the vaccine was unavoidably unsafe because the live poliomyelitis virus, which is the essence of the vaccine, always presented the danger of causing poliomyelitis. It also found that Wyeth had enclosed a circular warning of the danger with the vaccine. Using its two-step analysis, the court held that the vaccine's usefulness—prevention of paralysis—far outweighs the statistically miniscule risk that the vaccine may cause poliomyelitis. Thus, it is not unreasonably dangerous per se. The court found, however, that Wyeth had failed to provide adequate warnings of the risk attendant to use of the vaccine and held Wyeth strictly liable under comment k. *Accord, Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968).

B

The district court ruled that evidence that dienestrol was ineffective in preventing miscarriages was admissible because it was relevant to refute an affirmative defense based on comment k of section 402A. *Needham v. White Laboratories, Inc.*, No. 76 C 1101 (N.D. Ill., Aug. 13, 1979) (order denying pre-trial motion to exclude efficacy evidence). This ruling reflects a misunderstanding of the scope of comment k. A comment k defense is available only where the manufacturer warned of the danger, yet the product remains dangerous even if the warning is followed. In such a case, the manufacturer is exempted from strict liability only if the apparent usefulness of the product outweighs its known risk. *Singer v. Sterling Drug, Inc.*, 461 F.2d 288, 290 (7th Cir.), *cert. denied*, 409 U.S. 878 (1972). Since the usefulness of the product must outweigh the product risk before a comment k defense is available, evidence of product efficacy is relevant in a comment k case.

White's defense throughout this case has been that it did not know of the dangerous propensity of dienestrol.

No warning accompanied the drug. Thus, comment k, by its terms, could not provide a defense in this case. *Filler v. Rayex Corp.*, 435 F.2d 336, 338 (7th Cir. 1970). *See also Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Accordingly, White never attempted to assert an affirmative defense based on comment k. Rather, White correctly argued that comment j governed this cause of action for the dispositive issue in this case is whether White should be held liable for its failure to warn of the risk of cancer to the offspring of pregnant women who used dienestrol. If White knew, or by the application of reasonable human skill and foresight should have known, of the risk of cancer, White is liable to Needham for its failure to warn. *Woodhill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980). Because White failed to warn, comment k could not apply in this case, and evidence of the efficacy, or inefficacy, of dienestrol was irrelevant.

Alternatively, the district court ruled that efficacy evidence was admissible because it was relevant to prove that dienestrol was defective. The court held that an ineffective product is a defective product citing *Cunningham v. MacNeal Memorial Hospital, Needham v. White Laboratories, Inc.*, No. 76 C 1101 (N.D. Ill. Mar. 19, 1980) (order denying post-trial motion to reconsider). We disagree. *Cunningham* held that a product that contains an adulterating impurity is defective. 47 Ill. 2d at 454, 456, 266 N.E.2d at 902, 904. Plaintiff does not claim that the dienestrol her mother took in 1952 contained any impurity. Thus, *Cunningham* does not govern this case. Nothing in *Cunningham* supports the district court's interpretation of section 402A.

Of course, the error in admitting the efficacy evidence alone is not sufficient ground for reversal if the error was harmless. Our reading of the record convinces us, however, that this error was not harmless. Fed. R. Civ. P. 61, and, consequently, we reverse.

The trial court instructed the jury that it could find White liable if it found either that White knew or should have known that dienestrol could cause cancer in female offspring of the pregnant user *or* if it found that

dienestrol was ineffective in preventing miscarriages.[9] The jury did not return a special verdict, so we cannot discern if it held White liable solely because it found that dienestrol was ineffective. Section 402A does not impose strict liability based on the theory that an ineffective product is a defective product unreasonably dangerous. Therefore, we must reverse the jury verdict and remand for a new trial.

IV

White claims that the trial court erred in permitting Needham's witness, Dr. Michael B. Shimkin, to read into evidence a list of medical article titles. Dr. Shimkin testified on direct examination that the titles were of articles published before 1952 that discussed the possibility of a relationship between estrogen and cancer. Tr. at 183. On cross-examination he testified that he had not read all of the articles. The trial court accepted the list into evidence, over White's objection, for the limited purpose of showing that White should have known in 1952 that dienestrol could cause cancer. Tr. at 269.

A trial judge may admit a summary of voluminous writings into evidence. Fed. R. Evid. 1006. Admission of summaries is a matter that rests within the sound discretion of the judge. *Baines v. United States*, 426 F.2d 833, 840 (5th Cir. 1970). *See also Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300 (3d Cir. 1961).

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[9] The court instructed the jury that:

> [t]he plaintiff has the burden of proving by a preponderance of the evidence each of the following propositions in count 1 of her complaint. First, that the defendant knew, or reasonably should have known, in 1952 that Dienestrol could cause cancer to the female offspring of a person who was using it to prevent a miscarriage, or that Dienestrol was not apparently useful and desirable in 1952 in preventing miscarriages.
>
> And second, that the plaintiff was injured, and third, that Dienestrol was a proximate cause of the plaintiff's injuries.

Tr. at 1616.

Before a summary is admitted, the proponent must lay a proper foundation as to the admissibility of the material that is summarized and show that the summary is accurate. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d at 301. Needham failed to satisfy either of these requirements.

First, Needham failed to lay a proper foundation as to the admissibility of the articles. The article titles were admitted for the limited purpose of showing that White should have known that dienestrol caused cancer because numerous articles published before 1952 tended to show a relationship between estrogen and cancer. Given this purpose, the articles were relevant only if they discussed a relationship between estrogen and cancer. Dr. Shimkin, the foundational witness, testified that he had not read all of the articles. Tr. at 243. He further testified that some titles on the list did not discuss the relationship between estrogen and cancer at all. Tr. at 254, 258, 265, 267. Dr. Shimkin's testimony failed to show that all the titles were relevant for the limited purpose of demonstrating notice of the relationship between estrogen and cancer.

In addition, Needham failed to show that the list of articles accurately summarized the material contained in the original articles. As a rule, one should not assume that titles are an accurate summation of article contents. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d at 301. Since Dr. Shimkin had not read some of the articles, he was unable to testify that the list of titles accurately reflected and summarized what was contained in the articles.

Because Needham failed to lay an adequate foundation or to demonstrate that the titles were an accurate summary of the articles, the list of article titles should not have been admitted. The trial court abused its discretion in permitting the jury to consider this summary for the limited purpose of showing that White should have known of the relationship between estrogen and cancer.

V

For the reasons discussed in the preceding paragraphs, we reverse the judgment of the district court and remand. Each party is to bear its own costs on appeal. The court below is ordered to grant White a new trial consistent with our rulings.

REVERSED AND REMANDED.

FAIRCHILD, *Chief Judge*, dissenting. If we have jurisdiction to review the Judgment, I agree with reversal for the reasons well stated in Judge Bauer's opinion.

The more difficult question is whether we have jurisdiction to review the Judgment at all.

The Judgment was entered August 27, 1979. Defendant filed its motion for judgment under Rule 50(b) on September 5, 1979. It was timely filed and thus caused the time for appeal to begin anew on January 14, 1980, the date of entry of the district judge's order denying the 50(b) motion. Except for a possible thirty-day extension by the district court under Rule 4(a)(5), F.R.A.P., it does not appear that there were any further procedural steps which could extend or postpone the running of the time for appeal.

Although the applicable Rule seems clear enough, counsel and the district judge thought that defendant's filing of a motion to reconsider tolled the time for appeal.

The majority finds in *Thompson v. INS*, 375 U.S. 384, a "narrow exception" which validates the present appeal, apparently because of counsel's reliance on the assurance by the district judge that appellant's motion for reconsideration tolled the time. But the *Thompson* exception is too narrow to fit the situation before us.

In *Thompson* the Court predicated its holding not only on reliance on the district court's conclusion that a motion had been properly filed, but also upon appellant's performing "an act which, if properly done, postponed the deadline for the filing of his appeal."

In the case before us, the filing of a motion for reconsideration of the denial of the 50(b) motion was not an act which, if properly done, would postpone the deadline.

I join the majority in preferring that an appeal filed late in reliance upon a mistaken assurance by a district judge should be treated as timely filed. Perhaps the Supreme Court will broaden the *Thompson* exception. Perhaps it would not be too thin a fiction to treat the judge's assurance as a withdrawal of his previous denial, so that the 50(b) motion remained pending. Nevertheless, it seems to me the soundest view that the delay, though unfortunate, rendered the appeal untimely. It should therefore be dismissed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—1-27-81—350

CORRECTED

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Corrected May 11, 1981

April 27, 1981

Before

Hon. THOMAS E. FAIRCHILD, Chief Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

ANNE NEEDHAM,	)
	) Appeal from the United
Plaintiff-Appellee,	) States District Court
	) for the Northern Dist-
No. 80-1579 -Vs-	) trict of Illinois,
	) Eastern Division.
WHITE LABORATORIES, INC.,	) No. 76 C 1101
	) Bernard M. Decker, Judge
Defendant-Appellant.	)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellee Anne Needham, a vote of the active members of the Court was requested, and a majority of the active members of the Court have

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*The Honorable Eward Dumbauld, Senior Judge of the United States District Court for the Western District of Pennsylvania, is sitting by designation.

voted to deny a rehearing en banc.* A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, denied.

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*The Honorable Thomas E. Fairchild, the Honorable Luther M. Swygert and the Honorable Richard D. Cudahy voted to grant the petition for rehearing en banc solely on the issue of jurisdiction.

Opposition

Office - Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

1981 TERM

No. 81-191

ANNE NEEDHAM,

Petitioner,

vs.

WHITE LABORATORIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Rule 4(a) 8

Rule 59 12

Rule 60(b) 12

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Other Authorities

9 Moore's Federal Practice

¶ 203.11 3

¶ 204.12[2] 9, 10

Wright and Miller, Federal Practice and Procedure §1168 ..... 9, 10

Comment, Ad Hoc Relief For Untimely Appeals, 65 Colum. L. Rev. 97 (1965) 10, 14

Note, Prejudicial Reliance Upon a Trial Court's Ruling May Result in Suspension of Federal Rules on Timeliness of Appeals, 63 Mich. L. Rev. 1288 (1965) 10

IN THE

Supreme Court of the United States

1981 TERM

No. 81-191

ANNE NEEDHAM,

Plaintiff-Petitioner,

vs.

WHITE LABORATORIES, INC.,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent White Laboratories, Inc. respectfully prays that this Honorable Court deny petitioner's request that a writ of certiorari issue in this case.

QUESTIONS PRESENTED

1. Whether, given the unique circumstances of this case and the lack of any conflicting case law, the decision of the United States Court of Appeals for the Seventh Circuit should be reviewed by this Court.

2. Whether the Seventh Circuit Court of Appeals properly held that the respondent was entitled to rely on the district court's explicit assurance that the time for filing a notice of appeal was tolled.

STATEMENT OF FACTS

Since the petitioner's Statement of Facts has omitted the salient facts which were relied upon by the court of appeals in its decision to hear the respondent's appeal on the merits, Respondent White Laboratories, Inc. ("White")[1] offers a full statement of the facts below, pursuant to Rule 34(2) of the Rules of the Supreme Court of the United States.

Judgment in this cause was entered for plaintiff on August 27, 1979, by Judge Bernard M. Decker of the United States District Court for the Northern District of Illinois. White filed a timely post-trial motion, which Judge Decker denied on January 14, 1980. Because of its perception of errors of law and fact in Judge Decker's lengthy opinion, White filed a Motion for Reconsideration on February 4, 1980. At a court hearing the next day, February 5, 1980, Judge Decker decided to take the motion under consideration, and in accordance with the local practice, he set a briefing schedule. On March 20, 1980, he issued a nine-page decision, modifying his original opinion but re-affirming his denial of White's post-trial motion. A Notice of Appeal was filed within the thirty-day period following the denial of the motion.

The petitioner's jurisdictional attack centers on the hearing held before Judge Decker on February 5, 1980. At the hearing, the petitioner's attorney asked Judge Decker to deny outright White's Motion for Reconsideration. The trial court not only refused that request, but it found sufficient reason to set a full briefing schedule on the factual and legal issues raised by the Motion for Reconsideration.

At that point, counsel for White brought to the trial court's attention what he perceived as a dilemma concerning

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[1] Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, White Laboratories, Inc. states that it is a subsidiary of Schering Corporation, and has no affiliates.

the timing with respect to an appeal. The thirty-day period following the denial of White's original post-trial motion was due to expire in eight more days, on February 13, 1980. If White were to file a notice of appeal prior to February 13, 1980, that notice would be filed before any ruling on the Motion for Reconsideration, since the trial court had asked the parties to file briefs on the motion. The filing of such a notice, however, could arguably deprive the trial court of jurisdiction to rule on the Motion for Reconsideration. *See 9 Moore's Fed. Pr.*, ¶203.11 at 734-6; *In Re Federal Facilities Realty Trust*, 227 F.2d 651 (7th Cir. 1955); *Miller* v. *United States*, 114 F.2d 267 (7th Cir. 1940). Thus, if the trial court agreed that error had occurred in its denial of the post-trial motion, an order to that effect could be vulnerable to attack by the plaintiff on the ground that the trial court lacked jurisdiction once the notice of appeal had been filed. On the other hand, if White were to file a notice of appeal prior to the trial court's determination of the Motion for Reconsideration, the appeal itself could be challenged as premature, since a motion regarding the judgment was still pending and the judgment thereby lacked finality. *See Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203 (1943); *In Re Federal Facilities Realty Trust*, 227 F.2d 651 (7th Cir. 1955).

Consequently, at this hearing counsel for White sought clarification from the trial court as to whether its acceptance and consideration of the Motion could be construed as a temporary withdrawal of the ruling on the post-trial motions. In open court, Judge Decker explicitly assured counsel for both parties that the Motion for Reconsideration would toll the time for filing a notice of appeal.

THE COURT: Well, the motion tolls the time, if that's what your dilemma is.

MR. PHELAN: Well, I want to make certain, your Honor, that it is clear among all of us

that that is true; that by filing the motion for reconsideration and the Court ordering a briefing schedule, that we have, effectively, tolled the time for our appeal.

THE COURT: Well, unless the law was changed since last week, the motion for reconsideration tolls it.

MR. PHELAN: All right. Fine.

THE COURT: Until we dispose of it.

MR. PHELAN: All right. Thank you, your Honor.

Counsel for petitioner-plaintiff did not object, did not contest the court's statement and offered no clarification. In fact, counsel for petitioner-plaintiff agreed that White's Motion for Reconsideration was timely filed. A transcript of the entire hearing is attached hereto as Appendix A.

In reliance on this ruling by the trial court, White refrained from filing its Notice of Appeal until Judge Decker had an opportunity to rule on the Motion for Reconsideration. Had the trial court not given White the explicit assurance that its setting of a briefing schedule tolled the time for filing an appeal, White obviously could have, and would have, filed its Notice of Appeal within the eight-day period which remained for such appeal, under Rule 4 of the Federal Rules of Appellate Procedure. The timing of the filing of the Notice of Appeal was clearly based on the assurance of the district court—and the acquiescence by plaintiff's counsel—that the court's consideration of the post-trial motion would toll the time for filing a notice of appeal.

Consequently, the Seventh Circuit Court of Appeals rejected the petitioner's claim that the appeal was not timely filed. On January 27, 1980, it issued an Order and Opinion reversing and remanding this cause. *See Needham* v. *White Laboratories*, 639 F.2d 394 (7th Cir. 1981). In that opinion,

the Seventh Circuit found that it had jurisdiction to hear White's appeal on the basis of the unique circumstances doctrine, recognized by this Court in *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384, 84 S. Ct. 397 (1964). As Judge Bauer, writing for the court of appeals, stated:

> Defendant White should not be penalized for relying on the district court assurance that notice of appeal filed within thirty days of its disposition of the motion to reconsider would be timely. 639 F.2d at 398.

Petitioner-plaintiff then filed a petition for rehearing en banc, which was denied by a majority of the Seventh Circuit Court of Appeals on April 27, 1981. Pursuant to the mandate of the Seventh Circuit, this cause has since been returned to the United States District Court for the Northern District of Illinois, for a re-trial on liability.

REASONS FOR DENYING THE WRIT

1. The petition presents no issue for this Court to review because the opinion of the Seventh Circuit Court of Appeals properly follows the decisions of this Court, and is totally consistent with decisions of other circuit courts of appeals and with basic principles of fairness.

2. The petition presents no issue of importance for this Court to decide since the issue raised in the petition is entirely based on a specific set of facts which relate only to this case and would be of no value to courts or counsel in any other case.

Summary of Argument

The petition presents no issue for review by this Court. The Seventh Circuit Court of Appeals properly held that respondent was entitled to have its appeal heard on the merits. The decisions of this Court recognize that where a party relies to his detriment on the trial court's assurance

that a post-trial motion tolls the time to file an appeal, the party is entitled to have his appeal decided on the merits. Furthermore, the holding of the Seventh Circuit does not conflict with any decision of any other circuit court of appeals. The unique situation present in this case involves no substantial questions for consideration by this Court, and the petition should, therefore, be denied.

ARGUMENT

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS TOTALLY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS AND THEREFORE THE PETITION SHOULD BE DENIED.

A. The Seventh Circuit Properly Held That This Case Falls Within The "Unique Circumstances" Doctrine Exemplified In *Thompson* v. *Immigration and Naturalization Service,* 375 U.S. 384 (1964).

This Court has recognized that where a party relies on a district court's assurance that a motion is timely and will toll the time to file a notice of appeal, the party is entitled to have his appeal decided on the merits. *Thompson* v. *Immigration and Naturalization Service,* 375 U.S. 384 (1964). The *Thompson* case is one of three decisions from this Court defining what has come to be called the "unique circumstances" exception to the general principle requiring strict construction of the rules governing the time within which a party must file its notice of appeal. In *Thompson,* the petitioner appeared before the district court to file his motion for new trial, which was then two days late. The trial court assured him that the motion was filed in "ample time" and opposing counsel raised no objection to the timeliness of the motion. Within sixty days of the denial of that motion,

petitioner filed a notice of appeal.[2] Opposing counsel then moved to dismiss the appeal on the ground that the notice was untimely. The Court of Appeals for the Seventh Circuit granted that motion and this Court reversed.

This Court premised its reversal on the "unique circumstances" of the case, namely, that the district court had affirmatively misled the appellant into believing the time for appeal was tolled, that opposing counsel never objected at the trial level to the filing of the motion, and that the appellant relied on that determination and did not file a notice of appeal until disposition of the motion for new trial. As this Court noted:

> [I]f any questions had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motion. 375 U.S. at 386.

The exact circumstances in *Thompson* are present in this case. Just as in *Thompson,* here there was an assurance by the district court, a failure of opposing counsel to object to that assurance, the appellant's refraining from filing a notice of appeal in reliance on the court's ruling, and a subsequent attack on the jurisdiction of the circuit court of appeals by the very party who had agreed that the motion in question was "timely filed". Moreover, like the appellant in *Thompson,* had any question been raised about the timeliness of its motion or about the tolling of the appeal time, White could have easily filed a notice of appeal within the remaining eight days. The Seventh Circuit recognized the applicability

[2]At the time of petitioner's appeal, Rule 73(a) of the Federal Rules of Civil Procedure provided sixty days following entry of judgment for filing a notice of appeal.

of the *Thompson* doctrine to this case, and therefore ruled on the merits of White's appeal:

> At the hearing on White's motion to reconsider, conducted on February 5, 1980, plaintiff's counsel informed the district court that the motion was timely. White's counsel specifically asked the district court whether the motion to reconsider tolled the time for appeal, and the district court assured defendant that the motion tolled the appeal time until it disposed of the motion. The district court denied the motion for reconsideration on March 20, 1980. White filed [its] notice of appeal on April 21, 1980, within the assumedly new limitation period. Defendant White should not be penalized for relying on the district court assurance that notice of appeal filed within thirty days of its disposition of the motion to reconsider would be timely. *Needham* v. *White Laboratories*, 639 F.2d at 398.

A review of the *Thompson* doctrine and its origin confirms that this ruling was absolutely correct and well within the established case law of this Court.

Thompson is considered an extension of the "unique circumstances" exception of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam). In *Harris*, an Illinois district court granted a motion for an extension of time to file a notice of appeal, pursuant to former Rule 73(a), now Rule 4(a) of the Federal Rule of Appellate Procedure, based on the presence of excusable neglect. The petitioner filed a notice of appeal within the time for the extension, but subsequent to the original appeal period. The Seventh Circuit ruled that there had not been a showing of excusable neglect, the only basis for an extension of time available under Rule 73(a) at that time, and dismissed the action for lack of jurisdiction, based on an

untimely notice of appeal. This Court vacated the dismissal and remanded the case for a hearing on the merits:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of "excusable neglect" prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. 371 U.S. at 217.

The unique circumstances doctrine was similarly applied in the case of *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam). In *Wolfsohn*, the trial court granted an extension beyond the required ten-day period for post-trial motions. The movant relied on the extension of time and did not file a notice of appeal until after the post-trial motion had been denied several months later. The Court of Appeals for the District of Columbia dismissed the appeal as untimely, and this Court reversed in a *per curiam* decision, citing both *Harris* and *Thompson*, recognizing that a party's good faith reliance on an erroneous action of the district court falls within the "unique circumstances" exception to the strict construction of the timely notice rule. *See Wright & Miller, Fed. Pr. and Proc.* §1168 at 638 n.15. Accordingly, some commentators refer to the "Thompson-Wolfsohn reliance principle," with the very reason for its existence exemplified in the name of the doctrine. *See 9 Moore's Fed. Pr.* ¶204.12[2] at 4-75, n.12.

In order to avoid application of the *Thompson* doctrine to this case, the petitioner has attempted to argue that there is an additional requirement which is not present here. Petitioner claims that the doctrine requires both reliance on a district court's assurance and the existence of an act which, if properly done, tolls the time for filing a notice of appeal.

This Court has never delineated such a requirement, however, the circuit courts which have applied *Thompson* have not recognized it as such, nor have the commentators ever included it in any discussion of the "Thompson-Wolfsohn" or "unique circumstances" doctrine.[3]

Plaintiff-appellee attempts to make a distinction without a difference. By the very nature of the doctrine, the factual circumstances of cases which are embraced by that doctrine will differ. Thus, the fact that there was no "act which if properly done, would have tolled the time for appeal" in this case is not particularly significant. Reliance on a district court's erroneous assurances that a party has additional time to file a motion which will toll the appeal time is analogous to reliance on a district court's erroneous assurances that a motion to reconsider such a motion does toll the time, and the result is undoubtedly the same. Obviously, appellant would have filed a notice of appeal properly had the district court not made its explicit assurance. Under these circumstances, the Seventh Circuit Court of Appeals correctly found that this appeal should be heard on its merits, and the petition before this Court should be denied.

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[3] For example, Wright and Miller, in their discussion of *Thompson* and its progeny, explain that the "unique circumstances" concept is based on a theory of estoppel. Wright & Miller, *Fed. Pr. and Proc.* ¶1168 at 639. They point out:

> The Supreme Court seems to have concluded that a party ought not be denied an opportunity to appeal because of his failure to file a timely appeal when that failure resulted from reliance on action taken by the district court that generated a reasonable belief that an appeal could be initiated at a later date. *Id.*

See also 9 *Moore's Fed. Pr.* ¶204.12[2]; Comment, Ad Hoc Relief For Untimely Appeals, 65 *Colum. L. Rev.* 97 (1965); Note, Prejudicial Reliance Upon a Trial Court's Ruling May Result in a Suspension of Federal Rules on Timeliness of Appeals, 63 *Mich. L. Rev.* 1288 (1965).

B. The Decision Of The Seventh Circuit Court Of Appeals Is Entirely Consistent With Decisions Of Other Circuit Courts Of Appeals.

Petitioner-plaintiff alleges that "hopeless confusion" exists in the courts because the decision below is "in direct conflict with prior decisions in the Circuits". *See* Petition at 10 and 11. Yet the petitioner fails to cite a single decision from another circuit which shows any conflict with the decision of the Seventh Circuit in this case.

In fact, the few decisions of other circuits which address this unusual type of situation are entirely consistent with the decision of the court of appeals here. *See Hernandez-Rivera* v. *Immigration & Naturalization Service,* 630 F.2d 1352 (9th Cir. 1980); *Vine* v. *Beneficial Finance Company,* 374 F.2d 627 (2d Cir. 1967), cert. den. 389 U.S. 970, 88 S. Ct. 463 (1967); *Pierre* v. *Jordan,* 333 F.2d 951 (9th Cir. 1964), *cert. den.* 379 U.S. 974, 85 S. Ct. 664 (1965), reh. den. 380 U.S. 927, 85 S. Ct. 884 (1965). *See also Government of the Virgin Islands* v. *Gereau,* 603 F.2d 438 (3d Cir. 1979); *Warren* v. *United States,* 358 F.2d 527 (D.C. Cir. 1965); *cf. Chipser* v. *Kohlmeyer & Co.,* 600 F.2d 1061 (5th Cir. 1979).

In *Hernandez-Rivera* v. *Immigration & Naturalization Service,* 630 F.2d 1352 (9th Cir. 1980), for example, an immigration judge orally notified the petitioners that they had ten days from the close of deportation hearings in which to appeal. Eight days later counsel for the petitoners requested a fifteen-day extension to file the appeal. The immigration judge granted the extension, but the Board of Immigration Appeals subsequently dismissed the appeal as untimely. The Ninth Circuit reversed, finding that the principles of *Thompson* and *Harris* were fully applicable to the case:

> In each case, counsel for the appellant was lulled into the false sense of security that he could delay filing the notice of appeal until after the time prescribed by the applicable rules because of the extension of time granted

> by the court. In each case, the appellant was misled by the words or conduct of the trial court into believing that the time for appeal was extended beyond that prescribed by the applicable rules. 630 F.2d at 1355.

Similarly, the Court of Appeals for the Second Circuit, in *Vine* v. *Beneficial Finance Company*, 374 F.2d 627 (2d Cir. 1967), held that a motion for reargument of a dismissal order tolled the running of the period for filing a notice of appeal. The trial court there had ordered a dismissal on February 23, 1966, but appellee Vine filed a notice of motion for leave to reargue the dismissal on March 10, a date stipulated by both parties for such a motion. The court denied that motion on April 6, 1966, and appellant filed his appeal one week later. The Second Circuit, *sua sponte*, examined the question of jurisdiction and reviewed Rules 59, 60(b) and the Advisory Committee Notes. It concluded that a motion for reargument of a post-trial motion should toll the running of time for appeal in such an instance. Citing *Thompson* and *Wolfsohn*, the court held:

> Under these circumstances, we think that Vine could reasonably withhold his notice of appeal until the motion to reargue was decided. 374 F.2d at 632.

The court reasoned that Vine's motion was not made within the required period because of the stipulation of the parties and because of the actions by the court in receiving the motion and holding it for two weeks before deciding it. Therefore, the Second Circuit held, retroactive approval by the trial court of the stipulation could be implied. 374 F.2d at 632. Vine's reliance on the actions of the court and on opposing counsel constitued the circumstances necessary to bring the case within the *Thompson-Wolfsohn* doctrine.

The parallels between the foregoing cases and *Needham* are pointed. In each case, the appellant had time to file a proper notice of appeal, but, because of reliance on the district court, delayed filing the notice until after the time

prescribed by the applicable rules. Significantly, in *Needham*, as in *Vine*, the opposing party argued the post-trial motion on the merits, and totally failed to object to the timeliness of the motion or to the tolling of time for filing a notice of appeal.

Rather than conflict with the decision in *Needham*, decisions from other circuits simply highlight the reasons why the Seventh Circuit determined that it had jurisdiction to hear the appeal in this cause. The petitioner's contention that some unidentified conflict exists among the circuits is totally unsupported and this Court should deny the petition for writ of certiorari.

II. THE DECISION BELOW IS LIMITED TO THE UNIQUE CIRCUMSTANCES OF THIS CASE AND THEREFORE PRESENTS NO ISSUE OF GENERAL IMPORTANCE FOR REVIEW BY THIS COURT.

The petition fails to illustrate why the questions presented are so substantial as to require consideration by this Court, in accordance with Rule 15 and 17 of the Rules of the United States Supreme Court. In fact, the unusual procedural position of White, the express assurances of the district court, and the apparent concurrence of counsel for petitioner-plaintiff constitute a most uncommon situation, of interest to no one except the parties in this case.

Furthermore, petitioner's concern with the general problem of "finality of adjudication" is entirely inappropriate in this particular case. *Needham* is clearly not an example of dilatory tactics to stretch out time for appeal. In fact, Judge Decker openly stated that he had expected a motion for reconsideration, and pointed out to counsel for plaintiff-appellee that this was a most complex case which he was eager to re-examine. That the Motion for Reconsideration was an earnest attempt to correct an erroneous ruling is proven by the Seventh Circuit Court of Appeal's unanimous reversal of that ruling on the merits. Rather than undermining the

finality of adjudication, the opinion below takes cognizance of an important countervailing consideration. As one commentator cogently pointed out:

> [T]he interests in finality are not the only considerations involved in the principle that appeals must be timely, a principle which concerns the basic right to a full hearing itself. The very existence of an appellate judicial system implies a countervailing interest in insuring a proper disposition on the merits through the safeguard of review by a higher court. When the three cases [*Thompson, Harris* and *Wolfsohn*] discussed are considered in this context, it is clear that in each the petitioner should not have lost his right to appeal through the inadvertence of the trial court, provided the opposing party was not unfairly prejudiced. Since the time for appeal had not expired when the petitioner sought an extension of the deadline, the interests of the opposing party could not have been compromised by lack of finality because he could not have acted in reliance on the judgment. Comment, 65 *Colum. L. Rev.* at 106 (1965).

Any argument that a finding of jurisdiction in this case would somehow open the floodgates to unlimited time for appeal or create some overwhelming flow of exceptions is totally without reason or foundation and ignores the needs of fairness and justice.

Because this case is procedurally anomalous and because the decision below was based entirely on the very unique circumstances of this case, the ruling of the Seventh Circuit should not be disturbed, and the petition in this cause should be denied.

CONCLUSION

The Seventh Circuit Court of Appeals properly held that White's appeal should be heard on its merits. That holding is not in conflict with any decision of this Court or any circuit court of appeals. In fact, any contrary result would violate established case law and the most basic principles of fairness. To grant the petition in this cause would not further the ends of justice nor provide any useful guidance to trial judges or attorneys.

For all of the foregoing reasons, respondent White Laboratories, Inc., requests that petitioner-plaintiff's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully Submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANNE NEEDHAM,

Plaintiff,

No. 76 C 1101 vs.

WHITE LABORATORIES, INC.,

Defendant.

Before the HON. BERNARD M. DECKER, Judge, on Tuesday, February 5, 1980, at the hour of 10:00 o'clock, a.m.

PRESENT: MR. JEFFREY SUSSMAN,
on behalf of plaintiff;
MR. RICHARD J. PHELAN,
MR. MICHAEL A. POPE,
on behalf of defendant.

THE CLERK: 76 C 1101, Needham vs. White Laboratories; defendant's motion for reconsideration.

MR. SUSSMAN: Good morning, your Honor.

THE COURT: Good morning.

MR. SUSSMAN: Jeff Sussman for the plaintiff.

MR. PHELAN: Your Honor, good morning. Dick Phelan and Michael Pope for the defendant.

Your Honor, this is our motion for reconsideration of the Court's opinion, which I think is, hopefully, well stated in the motion for reconsideration. I don't think that I have anything to add to that.

THE COURT: I probably shouldn't admit this but I have been expecting it. So, it is here. And I suppose you want to respond?

MR. SUSSMAN: Yes, your Honor. If I may for just a moment, last night I received this motion with supporting memorandum. I have had ample opportunity to go over the motion, however, it is supported by a twenty page memorandum which I have not had time yet to go through thoroughly.

THE COURT: Well, tell me what you want.

MR. SUSSMAN: Well, your Honor, this morning I would like to ask you to deny their motion for reconsideration at this time and not to take it under advisement for reconsideration.

As I am sure we all remember in this litigation, your Honor, it was complex litigation—

THE COURT: Well tell me—I mean, this is unusual; I mean, it is timely, isn't it, isn't the motion filed timely?

MR. SUSSMAN: Yes—it is, well, it is timely in relation to your memorandum opinion being filed.

THE COURT: Well, what is the difficulty with your looking at the—you haven't even read the brief yet.

MR. SUSSMAN: Well, I am ready to discuss—

THE COURT: Well, I'm not ready—

MR. SUSSMAN: —their—

THE COURT: I'm not ready to discuss it. I mean, it is a complex case; I spent some time writing the opinion. I am certainly willing to take a look and see if counsel convince me that something was wrong, and you take a look, too.

MR. SUSSMAN: Well, as I said, your Honor—

THE COURT: You are not going to convince me just out of hand here. With a twenty page brief, I should read it.

MR. SUSSMAN: Okay. Then I would request 21 days to respond to counsel's memorandum.

THE COURT: Well, if it is so apparent that you were willing to do it this morning out of hand, you don't need twenty-one days.

MR. SUSSMAN: Your Honor, what I wanted to discuss this morning was the motion for reconsideration. They have asked you to either reverse your opinion or to reconsider.

THE COURT: Yes.

MR. SUSSMAN: I am asking you to deny their motion for reconsideration at this time. I am not able to argue the grounds under which they are bringing new evidence to this Court at this time.

THE COURT: I don't know anything about the new evidence, I mean—Let me take a look at it and you respond to it within 14 days and then 7 to respond.

MR. PHELAN: Your Honor, I humbly bring to the court a dilemma that I see in the law and that is, this Court rendered an opinion of twenty-plus pages, I believe on January the 10th of 1980.

THE COURT: Well, the motion tolls the time, if that's what your dilemma is.

MR. PHELAN: Well, I want to make certain, your Honor, that it is clear among all of us that that is true; that by filing the motion for reconsideration and the Court ordering a briefing schedule, that we have, effectively, tolled the time for our appeal.

THE COURT: Well, unless the law was changed since last week, the motion for reconsideration tolls it.

MR. PHELAN: All right. Fine.

THE COURT: Until we dispose of it.

MR. PHELAN: All right. Thank you, your Honor.

THE COURT: Yes, all right.

— — —

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript of proceedings before the HON. BERNARD M. DECKER was reported stenographically by me as Official Court Reporter and that it is a full and accurate transcription of my official shorthand notes.

/s/ ROBERT J. BETZ
Official Court Reporter
U.S. District Court